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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho;
TOM D. McELDOWNEY, Director of the Department of Finance of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

BRIEF OF THE STATE OF INDIANA AMICUS CURIAE IN SUPPORT OF APPELLANTS

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel, and William G. Mundy, Assistant Attorney General, submits its *amicus curiae* brief in support of the Appellants in the above-entitled cause, pursuant to Rule 42(4) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

The *amicus* accepts and adopts the "Statement of the Case" contained in Appellants' Jurisdictional Statement at pages 8-12.

INTEREST OF THE AMICUS

This brief submitted *amicus curiae* by the State of Indiana will only address the issue of the jurisdiction of the federal district court in this action. Indiana believes that this case reflects an alarming tendancy on the part of federal district courts to entertain jurisdiction over any controversy, regardless of where such controversy arises. Such practice has required the State of Indiana, as the District Court below required the State of Idaho, to defend two (2) lawsuits in Texas, well beyond the confines of Indiana's borders.

In *Rodriguez v. Marshall,* Civil Action Number 73-B-130, the United States District Court for the Southern District of Texas, Brownsville Division, on December 31, 1975, dismissed Indiana officials from a pending lawsuit, but not until the State's motion had been under advisement for over two years and attorneys for Indiana had made several trips to Texas. A case entitled *Ramiro Rivera, et al. v. Ray Marshall, etc., et al.,* Civil Number B-77-115, was filed in the same court on April 26, 1977, service was made upon the Indiana officials on October 24, 1978 and the State's Motion to Dismiss is pending.

Indiana is also vitally interested in this appeal since the same reasoning embraced by the United States Court of Appeals for the Fifth Circuit (hereafter Fifth Circuit) in finding that jurisdiction existed over Idaho officials would appear to apply with equal force to Indiana officials in performing their duties under this State's takeover laws. Indiana Code §§ 23-2-3-1 *et seq.* Indeed, Indiana is one of twenty-nine states which have enacted such legislation.

With the ever increasing number of lawsuits facing state governments today, it is imperative that states' attorneys

not be compelled to defend such lawsuits all across the nation in any district court that attempts to find jurisdiction.

ARGUMENT

I.

NO PERSONAL JURISDICTION EXISTED OVER THE IDAHO STATE OFFICIALS

A.

The Fifth Circuit has Unjustifiably Expanded the Fiction Present In Ex Parte Young

The Fifth Circuit conceded that "[b]ecause this suit was brought in Texas, not Idaho, the case . . . raises novel questions of jurisdiction and venue." *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1261 (5th Cir. 1978). It is submitted that the Fifth Circuit's responses to these novel questions were clearly erroneous.

In *Ex Parte Young,* 209 U.S. 123 (1908) this Court engaged in the fiction that since a state is incapable of authorizing an unconstitutional act, a state would have no interest in a suit alleging that a state official is acting in an unconstitutional manner. 209 U.S. at 159. By engaging in this fiction, the proscriptions of the Eleventh Amendment were avoided by stripping the official of his official character.

By expanding on this Court's reasoning in *Ex Parte Young,* the Fifth Circuit has carried the fiction to its most illogical implication:

> We read *Young* to say that a state official in enforcing an unconstitutional statute is an individual defendant and nothing more . . . 577 F.2d at 1265.

From that reasoning it would follow that a state would have no interest in defending actions of a state official alleged to be unconstitutional, in any federal forum, regardless of whether that federal forum is in the official's own state or any other state in the nation.

There comes a point when the decision in *Ex Parte Young* must be recognized for what it is—a fiction and nothing more. Obviously, Idaho, Indiana, and all other states of this Union have a strong and vital interest in preserving the constitutionality of their state's laws. This Court would do a great disservice to the States were it to blind itself to the reality of the situation as a result of a fiction which has now turned to fantasy. The necessary fiction of *Ex Parte Young* becomes totally unnecessary as utilized in the context of this action. The Appellee was certainly free to contest the validity of Idaho's takeover statute in an Idaho federal or state court. Instead, it compelled Idaho officials to go to Texas and assert their defense in a federal court there. Legal fictions should only be utilized when necessary. The *amicus* would submit that *Ex Parte Young* strips a state official of sovereign immunity for Eleventh Amendment purposes only within his own state.

B.

The Texas' Long Arm Statute Does Not Provide Personal Jurisdiction Over The Idaho State Officials

Personal jurisdiction over the Idaho officials was premised upon Federal Rules of Civil Procedure 4(d)(7) and 4(c). Those rules allow personal jurisdiction to be obtained through the long arm statute of the forum state. The Texas long arm statute, Tex. Rev. Civ. Stat. Ann. art.

2031b, § 4, authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. *Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228 (5th Cir. 1973). The guidelines as offered by this Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), *Hanson v. Denckla,* 357 U.S. 235 (1958); *Shafter v. Heitner,* 433 U.S. 186 (1977); and *Kulko v. Superior Court of California,* — U.S. —, 98 S.Ct. 1690 (1978) as to what constitutes the limits of due process will be explored below. Generally, however, two tests have been utilized in determining whether due process permits assertion of personal jurisdiction over nonresidents: (1) the "minimum contacts" test and (2) the "fundamental fairness" test. The assumption of personal jurisdiction by the district court below over the Idaho officials failed to meet either test.

The minimum contacts necessary to confer personal jurisdiction must involve activity that shows the defendant has purposefully availed himself of the benefits and protection of the forum state's laws. *Hanson v. Denckla, supra.* In determining whether the contacts with the forum could support the inference that the nonresident defendant purposefully availed himself of the benefits of conducting business in the forum, the Fifth Circuit, in *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483, 496 (5th Cir. 1974), observed that the:

> [o]perative consideration is that the defendants' contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise.

There are fewer contacts between the defendants and the State of Texas in the present case than there were

in *Hanson v. Denckla, supra,* where this Court found insufficient contacts to meet due process requirements. In noting the absence of the minimal contacts necessary to support the exercise of jurisdiction over nonresidents, this Court in *Hanson v. Denckla,* observed that the action did not arise out of an act done or transaction consumated in the forum state or to enforce an obligation that arose from a privilege the defendant exercised in the forum state. Moreover, in *Kulko v. Superior Court, supra,* this Court observed that the act in question demonstrated no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would give rise to the assertion of that State's jurisdiction.

In the present case, there were no actions by the defendants that could be interpreted as an attempt to avail themselves of the benefits and protection of the forum state's law. Accordingly, as in *Hanson* and *Kulko,* there are insufficient contacts between the defendant and the forum state to meet due process requirements.

The fairness test requires that there be a rational basis between the lawsuit and the forum so that it is reasonable to require the defendant to defend the suit.

In *Oxford First Corp. v. PNC Liquidating Corp.,* 372 F.Supp. 191, 203 (E.D. Pa. 1974) the district court established guidelines in determining whether the fairness test was met:

(1) determine the extent of the defendant's contacts with the place where the action was brought,

(2) weigh the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business,

(3) consider judicial economy,

(4) consider the probable situs of discovery proceedings,

(5) examine the impact of the defendant's activities beyond his borders.

In the present case, consideration of the first four factors as listed above would indicate that Texas had no personal jurisdiction over the defendants. The defendants conducted no activities in Texas, so there were no direct contacts with the place where the action was brought. There was considerable inconvenience to the defendant in being required to defend in Texas—quite a distance from the defendant's official residence. Likewise, the state officials from Idaho were not involved in any type of interstate business, and because of the nature of their official duties, it was most inconvenient to require them to defend the suit in a distant forum. Since the suit involved the constitutionality of Idaho's statute, it is obvious that the situs of discovery proceedings should not be in Texas.

In considering the fifth factor, *i.e.,* the impact of the defendant's activities beyond his border, it should be noted that the only impact was the effect of the regulation that Great Western felt in Texas, which was brought about solely by Great Western's willful refusal to comply with Idaho law. As Justice Godbald points out in his dissenting opinion, this Court decided in *Kulko, supra,* that jurisdiction based solely upon a causal effect in a state was unreasonable where the action arose from neither the defendant's causing physical injury in the state nor his commercial transactions in interstate commerce. 577 F.2d, at 1289.

The fairness test has a subjective quality in that it requires the contacts between the defendant and the forum to be of such quality that it is reasonable to expect the

defendant to defend the suit in the forum state. That assumption does not rationally follow in this case. The slight effect of the Idaho statute in Texas is not sufficient activity to subject Idaho officials to personal jurisdiction in this cause of action under either the minimum contacts or the fairness standard.

The possible long-range effects of the decision by the Fifth Circuit are staggering. If the decision were followed to its logical conclusion, a state could be forced to defend a lawsuit in any district court in the country where a plaintiff attempts to find jurisdiction. The resulting drain upon state treasuries and the practical burdens upon state personnel as a result of defending actions in far removed forums should be given this Court's fullest consideration. It is not only inconvenient, but unreasonable to expect a state to defend its laws anywhere in the nation.

CONCLUSION

For the foregoing reasons, the *Amicus,* State of Indiana respectfully urges that this Court note probable jurisdiction.

Respectfully submitted,

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